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In the

SUPREME COURT OF THE UNITED STATES

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF OF THE STATES OF ALABAMA, MISSISSIPPI, NEVADA, SOUTH CAROLINA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. AN EXAMINATION OF THE EIGHTEEN STATUTES THAT PROHIBIT OR RESTRICT THE EXECUTION OF THE MENTALLY RETARDED DEMONSTRATES THE LACK OF A NATIONAL CONSENSUS CATEGORICALLY PROHIBITING THE EXECUTION OF MENTALLY RETARDED INDIVIDUALS 3

A. The Eighteen States That Have Enacted Statutes Prohibiting Or Restricting The Execution Of The Mentally Retarded Do Not Agree On A Definition Of Mental Retardation 7

B. The Eighteen States Sharply Disagree About The Proper Burden Of Proof That An Individual Must Satisfy In Order To Establish That He Or She Is Mentally Retarded 14

C. The Eighteen States Disagree About Whether The Trial Court Or The Jury Should Be Responsible For Determining If An Individual Is Mentally Retarded And About The Proper Time During A Criminal Proceeding For That Determination To Be Made ... 15

D. The Eighteen States Disagree About Whether All Or Only Certain Mentally Retarded Individuals Should Be Protected By These Statutes 17

E. Conclusion 20

II. SOCIETY'S EVOLVING STANDARDS OF DECENCY, AS EVIDENCED THROUGH THE LEGISLATIVE ENACTMENTS OF THE STATES, DO NOT WARRANT GRANTING THE RELIEF REQUESTED BY ATKINS. 21

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

City of Cave Springs v. City of Rogers,
37 S.W.3d 607 (Ark. 2001) 18

District Attorney for the Suffolk District v. Watson,
411 N.E.2d 1274 (Mass. 1980) 23

Fleming v. Zant,
386 S.E.2d 339 (Ga. 1989) 19

Furman v. Georgia,
408 U.S. 238 (1972) 22

Gregg v. Georgia,
428 U.S. 153 ..... 1, 4, 22

Harmelin v. Michigan,
501 U.S. 957 (1990) 22

Johnson v. Louisiana,
406 U.S. 356 (1972) 26

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 27

Penry v. Lynaugh,
492 U.S. 302 (1989) ..... passim

People v. Anderson,
493 P.2d 880 (Cal. 1972) 23

Stanford v. Kentucky,
492 U.S. 361 (1989) 1, 4, 20, 22

Trop v. Dulles,
356 U.S. 86 (1958) 22

Van Tran v. State,
2001 WL 1538508 (Tenn. Dec. 4, 2001)) 18

Statutes

Alabama (ALA. CODE § 13A-3-1 (1975)) 21

Alabama (ALA. CODE § 13A-5-52 (1975)) 21

Alabama (ALA. CODE §§ 13A-5-51(2) and (6) (1975)) 25

Alabama (ALA. CODE § 13A-5-52 (1975)) 25

Arizona (A.R.S. § 13-703.02 (2001)) 3

Arizona (A.R.S. § 13-703.02(A), (F), and (G) (2001)) 16

Arizona (A.R.S. § 13-703.02(F) (2001)) 9, 14

Arizona (A.R.S. § 13-703.02(I) (2001)) 17

Arizona (A.R.S. § 13-703.02(J)(1) (2001)) 10

Arizona (A.R.S. § 13-703.02(J)(2) (2001)) 10, 13

Arizona (A.R.S. § 13-703.02(J)(4) (2001)) 8

Arkansas (Ark. Stat. Ann. § 5-4-618 (1993)) 3, 12, 18

Arkansas (Ark. Stat. Ann. § 5-4-618(a)(1)(A)
(1993)) 10, 13

Arkansas (Ark. Stat. Ann. § 5-4-618(a)(2) (1993)) 9

Arkansas (Ark. Stat. Ann. § 5-4-618(c) (1993)) 14

Arkansas (Ark. Stat. Ann. § 5-4-618(d)(2) (1993)) 16

Colorado (C.R.S. § 16-9-401 (1993)) 3, 9, 12
Colorado (C.R.S. § 16-9-401(2) (1993)) 10, 13
Colorado (C.R.S. § 16-9-402 (1993)) 19
Colorado (C.R.S. § 16-9-402(1) and (2) (1993)) 16
Colorado (C.R.S. § 16-9-402(2) (1993)) 14
Connecticut (C.G.S.A. § 1-1g(a) (2001)) 10
Connecticut (C.G.S.A. § 1-1g(b) (2001)) 8, 11, 13
Connecticut (C.G.S.A. § 53a-46a (2001)) 15, 19
Connecticut (C.G.S.A. § 53a-46a(h)(2) (2001)) 3, 16
Florida (West's F.S.A. § 921.137 (2001)) 3
Florida (West's F.S.A. § 921.137(1) (2001)) 8, 10, 11, 13
Florida (West's F.S.A. § 921.137(4) (2001)) 14, 17
Florida (West's F.S.A. § 921.137(8) (2001)) 17
Georgia (O.C.G.A. § 17-7-131 (1988)) 3, 9, 12, 19
Georgia (O.C.G.A. § 17-7-131(a)(3) (1988)) 10, 13
Georgia (O.C.G.A. § 17-7-131(c)(3) (1988)) 14, 16
Indiana (IN ST § 35-36-9-6 (1994)) 3
Indiana (IN ST 35-36-9-2 (1994)) 9, 13
Indiana (IN ST 35-36-9-2(2) (1994)) 10
Indiana (IN ST 35-36-9-4(b) (1994)) 14
Indiana (IN ST 35-36-9-5 (1994)) 16
Indiana (IN ST 35-36-9-6 (1994)) 12, 17
Kansas (K.S.A. § 76-12b01) 8, 10, 11, 13

Kansas (K.S.A. § 76-12b01(d) (1994)) 8
Kansas (K.S.A. § 76-12b01(d) (1994); § 21-4623(e) (1994)) 8
Kansas (K.S.A. § 76-12b01(d); § 21-4623(e)) 24
Kansas (K.S.A. § 21-4623 (1994)) 3, 15
Kansas (K.S.A. § 21-4623(a) and (b) (1994)) 16
Kansas (K.S.A. § 21-4631(c) (1994)) 17
Kentucky (KRS § 532.130 (1990)) 3, 12
Kentucky (KRS § 532.130(2) (1990)) 8, 10, 13
Kentucky (KRS § 532.135 (1990)) 15
Kentucky (KRS § 532.135(1) and (2) (1990)) 16
Kentucky (KRS § 532.140(3) (1990)) 17
Maryland (Md. Ann. Code art. 27 § 412 (1989)) 3
Maryland (Md. Ann. Code art. 27, § 412 (1989)) 12, 16, 17
Maryland (Md. Ann. Code art. 27, § 412(f)(3) (1989)) 8, 10, 13
Maryland (Md. Ann. Code art. 27, § 412(g)(1) (1989)) 14
Missouri (§ 565.030 R.S.Mo. (2001)) 9
Missouri (§ 565.030, R.S.Mo. (2001)) 3
Missouri (§ 565.030.4(1) R.S.Mo. (2001)) 14
Missouri (§ 565.030.5 R.S.Mo. (2001)) 16
Missouri (§ 565.030.6 R.S.Mo. (2001)) 10, 11, 13
Missouri (§ 565.030.7 R.S.Mo. (2001)) 17

Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)) ... 7, 9, 10, 12

Nebraska (R.R.S. Neb. § 28-105.01 (1998)) 3, 12

Nebraska (R.R.S. Neb. § 28-105.01(4) (1998)) 18

Nebraska (R.R.S. Neb. § 28-105.01(5) (1998)) 14, 16

New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)) 7, 9, 10, 12

New Mexico (N.M. Stat. Ann. § 31-20A-2.1 (1991)) 12, 19

New Mexico (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)) 14, 16

New Mexico (N.M. Stat. Ann. §31-20A-2.1 (1991)) 3

New York (NY CLS CPL § 400.27(12)(d) (1995)) 20

New York (NY CLS CPL § 400.27(12)(e) (1995)) 10, 13

New York (NY CLS CPL § 400.27 (1995)) 3, 9, 12, 17

New York (NY CLS CPL § 400.27(12)(a) (1995)) 14, 17

New York (NY CLS CPL § 400.27(12)(c) (1995)) 17

North Carolina (N.C.G.S.A. § 15A-2005 (2001)) 3

North Carolina (N.C.G.S.A. § 15A-2005(2)(c) (2001)) 14

North Carolina (N.C.G.S.A. § 15A-2005(2)(e) and (f) (2001)) 15

North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(a) (2001)) 10, 13

North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(b) (2001)) 11

North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(c) (2001)) 8

North Carolina (N.C.G.S.A. § 15A-2005(c) and (e) (2001)) 16

North Carolina (N.C.G.S.A. § 15A-2006(2) (2001)) 18

South Dakota (SDCL § 23A-27A-26 (2000)) 3

South Dakota (SDCL § 23A-27A-26.1 (2000)) 12, 13, 19

South Dakota (SDCL § 23A-27A-26.2 (2000)) 9, 10

South Dakota (SDCL § 23A-27A-26.3 (2000)) 14, 16

Tennessee (Tenn. Code. Ann. § 39-13-203 (1990)) 3, 12, 18

Tennessee (Tenn. Code. Ann. § 39-13-203(a)(1) (1990)) 8

Tennessee (Tenn. Code. Ann. § 39-13-203(a)(2) (1990)) 10

Tennessee (Tenn. Code. Ann. § 39-13-203(a)(3) (1990)) 13

Tennessee (Tenn. Code. Ann. § 39-13-203(c) (1990)) 14

Tennessee (Tenn. Code. Ann. § 39-13-203(c) and (e) (1990)) 16

Washington (WA ST § 10.95.030 (1993)) 3, 19

Washington (WA ST § 10.95.030(2) (1993)) 14, 16

Washington (WA ST § 10.95.030(2)(a) (1993)) 10

Washington (WA ST § 10.95.030(2)(c) (1993)) 8

Washington (WA ST § 10.95.030(2)(d) (1993)) 10

Washington (WA ST § 10.95.030(2)(e) (1993)) 13

Other Authorities

Constitution of California of 1879,
Art. 1, § 27 (Added Nov. 7, 1972) 23

MASS. GEN. LAWS CONST.,
Pt. 1, Art. 26 (Amended 1982) 23

Webster's New International Dictionary
Unabridged (3rd ed. 1993) 20

INTEREST OF *AMICI CURIAE*

The States of Alabama, Mississippi, Nevada, South Carolina, and Utah and the Attorney General of Alabama, Bill Pryor, respectfully submit this brief as *amici curiae*, pursuant to Sup. Ct. R. 37.4, because of their fundamental interest in preserving the applicability of the death penalty to all capital defendants who have "the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 338 (1989). *Amici* belong to the majority of death penalty states that have followed *Penry*, not by imposition of a blunt per se rule, but rather by the enactment of various statutes allowing capital defendants to present evidence of limited mental capacity in the course of trial and sentencing. *Amici* believe that this sort of regime is a just and sensitive way to give substance to *Penry*, while at the same time ensuring that their laws are vigorously enforced. *Amici*, therefore, ask this Court not to overturn the various state statutes addressing the execution of the mentally retarded and to reaffirm *Penry*.

SUMMARY OF ARGUMENT

Petitioner Atkins urges this Court to replace *Penry v. Lynaugh*, 492 U.S. 302 (1989), with a per se constitutional rule prohibiting execution of any capital defendant found to be mentally retarded. To do so, however, petitioner bears the "heavy burden" of establishing that there is a national consensus against the execution of the mentally retarded. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (*quoting Gregg v. Georgia*, 428 U.S. at 175). Petitioner cannot meet this burden. Of the thirty-eight states, that currently authorize the death penalty, only eighteen have

expressly prohibited the execution of those mentally retarded individuals who satisfy the varying requirements of the individual state statutes. The majority (twenty), including *amici*, have followed *Penry*, not by imposition of a categorical rule, but rather by affording capital defendants multiple opportunities in the course of trial and sentencing to present evidence of limited mental capacity.

Even among the eighteen states that prohibit execution of the mentally retarded, there is significant disagreement about the appropriate definition of mental retardation and the proper burden of proof that a capital murderer must satisfy before he or she can be deemed mentally retarded. The states further disagree as to whether the trial court or the jury should be responsible for determining if a capital murderer is mentally retarded and as to when such a determination should be made. The states also disagree about whether their statutes should be applied prospectively or retroactively.

In short, our nation simply has not reached a state of moral consensus on the issue of mental retardation that can be reasonably interpreted and applied by this Court as an "evolving standard[ ] of decency that mark[s] the progress of a maturing society." *Penry*, 492 U.S. at 331. The states continue to experiment with a variety of statutory regimes as they attempt to ensure that the death penalty is applied in an even-handed manner to those who truly have "the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Penry*, 492 U.S. at 338. *Amici* urge this Court not to erase the states' careful efforts to address this delicate issue and to reaffirm the principles set forth in *Penry*.

ARGUMENT

I. AN EXAMINATION OF THE EIGHTEEN STATUTES THAT PROHIBIT OR RESTRICT THE EXECUTION OF THE MENTALLY RETARDED DEMONSTRATES THE LACK OF A NATIONAL CONSENSUS CATEGORICALLY PROHIBITING THE EXECUTION OF MENTALLY RETARDED INDIVIDUALS.

In Issue II of his brief, Atkins contends that a national consensus against the execution of the mentally retarded has emerged since this Court issued its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989). (Brief for Pet. at 37-41) To support this contention, Atkins relies, in part, on the fact that, although only two states[1] prohibited the execution of the mentally retarded at the time this Court decided *Penry* in 1989, sixteen additional states[2] have now enacted statutes prohibiting or restricting the execution of the mentally retarded. Without addressing

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1 Georgia (O.C.G.A. § 17-7-131 (1988)); Maryland (Md. Ann. Code art. 27 § 412 (1989)).

2 Arizona (A.R.S. § 13-703.02 (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618 (1993)); Colorado (C.R.S. § 16-9-401 (1993)); Connecticut (C.G.S.A. § 53a-46a(h)(2) (2001)); Florida (West's F.S.A. § 921.137 (2001)); Indiana (IN ST § 35-36-9-6 (1994)); Kansas (K.S.A. § 21-4623 (1994)); Kentucky (KRS § 532.130 (1990)); Missouri (§ 565.030, R.S.Mo. (2001)); Nebraska (R.R.S. Neb. § 28-105.01 (1998)); New Mexico (N.M. Stat. Ann. §31-20A-2.1 (1991)); New York (NY CLS CPL § 400.27 (1995)); North Carolina (N.C.G.S.A. § 15A-2005 (2001)); South Dakota (SDCL § 23A-27A-26 (2000)); Tennessee (Tenn. Code Ann. §39-13-203 (1990)); Washington (WA ST § 10.95.030 (1993)).

the content of these statutes, Atkins asserts that this development establishes the existence of a national consensus against the execution of mentally retarded individuals. (Brief for Pet. at 38-39)

In *Penry v. Lynaugh*, this Court held that the Eighth Amendment does not categorically prohibit the execution of the mentally retarded. *Penry*, 492 U.S. 302, 333-335 (1989). Emphasizing that "[t]he prohibition against cruel and unusual punishments also recognizes the 'evolving standards of decency that mark the progress of a maturing society,' " this Court noted that it "has looked to objective evidence of how our society views a particular punishment today" in order to discern those "evolving standards." *Id.* at 331. The *Penry* Court observed that legislation enacted by legislatures is the "clearest and most reliable objective evidence of contemporary values" and further noted that data relating to the actions of sentencing juries has been useful in such a determination as well. *Id.* This Court concluded that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of [an emerging] national consensus." *Id.* at 334.

This Court also considered and rejected an evolving standards of decency argument in *Stanford v. Kentucky*, 492 U.S. 361 (1989). In *Stanford*, the issue was "whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment." *Stanford*, 492 U.S. at 364-365. The *Stanford* Court noted that "it is the 'heavy burden' of petitioners, *Gregg v. Georgia*, 428 U.S. at 175, 96 S. Ct. at 2926, to establish a national consensus *against* it." *Id.* at

373. More specifically, this Court stated the following concerning whether the court's decision in *Stanford* established a national consensus against sentencing sixteen and seventeen-year-olds to death:

> Of the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it upon 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual. (footnote omitted)

Id. at 370-71. In addition, the *Stanford* Court emphasized that "[a] revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.* at 377.

In the present case, Atkins contends that the "great weight of the evidence now demonstrates that American society overwhelmingly opposes" the execution of mentally retarded individuals. (Brief for Pet. at 38) In fact, Atkins argues that "[t]he consensus that has manifested in the last dozen years is also remarkable for the consistency with which it defines the class of people who should be protected from the death penalty." (Brief for Pet. at 41, FN. 50) Atkins fails to mention, however, that the statutes in these eighteen states differ sharply from one another both in substance and procedure. The argument that the enactment of these various, sharply differing statutes reveals the existence of a national consensus against the execution of mentally retarded capital murderers is, therefore, misleading.

Instead of discussing or analyzing any of these eighteen statutes, Atkins simply explains that a proper "clinical diagnosis" of mental retardation requires three separate findings, including "(1) psychometric verification and measurement of the severity of an individual's cognitive impairment; (2) a clinical determination that the impairment...has an actual disabling effect on the individual's ability to function in the everyday world; and (3) documentation that the onset of the disability occurred early in life." (Brief for Pet. at 20) Atkins further explains that "[e]ach of these three elements is an essential component of a professional diagnosis of mental retardation," and he notes the definitions of mental retardation developed by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA) to illustrate that both of the definitions contain all three of the elements which he deems to be "essential" to a proper definition of mental retardation. (Brief for Pet. at 20-21)

Although he does briefly discuss the AAMR and the APA definitions of mental retardation, Atkins does not explicitly argue that this Court should adopt any one particular definition of mental retardation. In fact, Atkins does not even ask this Court to set forth a clear standard by which states must evaluate claims of mental retardation in the context of a criminal proceeding. Moreover, Atkins fails to demonstrate that he is, in fact, able to satisfy the requirements set forth in any recognized definition of mental retardation.

A. The Eighteen States That Have Enacted Statutes Prohibiting Or Restricting The Execution Of The Mentally Retarded Do Not Agree On A Definition Of Mental Retardation.

All but two of these eighteen states specify that, in order to be deemed mentally retarded, an individual must demonstrate a significantly subaverage general intellectual functioning, deficits in adaptive behavior or adaptive functioning, and show that his or her mental retardation manifested itself or became apparent during his or her developmental period. Two of these states do not require, however, that an individual's mental retardation become apparent or manifest itself during his or her developmental period. Under Nebraska law, "mental retardation" is defined as a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." R.R.S. Neb. § 28-105.01(3) (1998). Under New Mexico law, "mentally retarded" is also defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." N.M. Stat. Ann. § 31-20A-2.1(A) (1991). Nebraska and New Mexico are, therefore, missing one of the three elements that Atkins considers to be "essential" to a proper definition of mental retardation. (Brief for Pet. at 20-21)

Additionally, it should be noted that Kansas's statute addressing the execution of the mentally retarded is unique. Under Kansas law, "mental retardation" is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18," but Kansas law defines "mentally retarded" as "having significantly subaverage general intellectual

functioning, as defined by K.S.A. § 76-12b01, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of the law." K.S.A. § 76-12b01(d) (1994); § 21-4623(e) (1994). Unlike the other seventeen states, Kansas, therefore, requires that an additional element, namely the substantial impairment of one's capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law, be established before an individual can be deemed "mentally retarded."

In addition, an examination of the relevant statutes reveals that they sharply differ on the subject of the appropriate definition of these three elements. Between these eighteen states, there are a number of definitions of "significantly subaverage general intellectual functioning," "adaptive behavior" or "adaptive functioning," and "developmental period." In fact, some of these states have actually chosen not to set forth a definition of one, two, or even all three of these elements.

With respect to the "significantly subaverage general intellectual functioning" element, six states[3] define this element as an intelligence quotient of seventy (70) or below. Three states[4] define "significantly subaverage

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3 Arizona (A.R.S. § 13-703.02(J)(4) (2001)); Kentucky (KRS § 532.130(2) (1990)); Maryland (Md. Ann. Code art. 27, § 412(f)(3) (1989)); North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(c) (2001)); Tennessee (Tenn. Code. Ann. § 39-13-203(a)(1) (1990)); Washington (WA ST § 10.95.030(2)(c) (1993)).

4 Connecticut (C.G.S.A. § 1-1g(b) (2001)); Florida (West's F.S.A. § 921.137(1) (2001)); Kansas (K.S.A. § 76-12b01(i) (1994)).

general intellectual functioning" as a "performance [on an intelligence quotient test] which is two or more standard deviations from the mean score on a standardized intelligence test." Two states[5] specify that an intelligence quotient of sixty-five (65) or below establishes a rebuttable presumption that an individual is mentally retarded. Two states[6] specify that an intelligence quotient of seventy (70) or below on a reliably administered intelligence quotient test is presumptive evidence that an individual is mentally retarded. One state[7] specifies that an intelligence quotient exceeding seventy (70) will be presumptive evidence that an individual is not mentally retarded. In addition, five states[8] have not set forth any definition of "significantly subaverage general intellectual functioning." An examination of these statutes, therefore, demonstrates that there is absolutely no consensus among these states with respect to how the "significantly subaverage general intellectual functioning" element should be understood and defined within a definition of mental retardation.

Although all eighteen states specify that there must be a showing of deficits in "adaptive functioning" or "adaptive behavior" before an individual can be deemed

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5 Arizona (A.R.S. § 13-703.02(F) (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618(a)(2) (1993)).

6 Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)).

7 South Dakota (SDCL § 23A-27A-26.2 (2000)).

8 Colorado (C.R.S. § 16-9-401 (1993)); Georgia (O.C.G.A. § 17-7-131 (1988)); Indiana (IN ST 35-36-9-2 (1994)); Missouri (§ 565.030 R.S.Mo. (2001)); New York (NY CLS CPL § 400.27 (1995)).

mentally retarded, they disagree about how this requirement should be defined. Eight of the states[9] specifically require a showing of "significant" or "substantial" deficits or limitations in adaptive functioning or behavior, but the other ten states[10] simply require a showing of "deficits" or "limitations" in adaptive functioning or behavior. Washington[11] defines "adaptive behavior" as "the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age." Expanding on Washington's definition, Arizona[12] defines "adaptive behavior" as "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group." Very similarly,

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9 Arizona (A.R.S. § 13-703.02(J)(2) (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618(a)(1)(A) (1993)); Colorado (C.R.S. § 16-9-401(2) (1993)); Indiana (IN ST 35-36-9-2(2) (1994)); Kentucky (KRS § 532.130(2) (1990)); Missouri (§ 565.030.6 R.S.Mo. (2001)); North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(a) (2001)); South Dakota (SDCL § 23A-27A-26.2 (2000)).

10 Connecticut (C.G.S.A. § 1-1g(a) (2001)); Florida (West's F.S.A. § 921.137(1) (2001)); Georgia (O.C.G.A. § 17-7-131(a)(3) (1988)); Kansas (K.S.A. § 76-12b01(d) (1994)); Maryland (Md. Ann. Code art. 27, § 412(f)(3) (1989)); Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)); New York (NY CLS CPL § 400.27(12)(e) (1995)); Tennessee (Tenn. Code. Ann. § 39-13-203(a)(2) (1990)); Washington (WA ST § 10.95.030(2)(a) (1993)).

11 Washington (WA ST § 10.95.030(2)(d) (1993)).

12 Arizona (A.R.S. § 13-703.02(J)(1) (2001)).

Connecticut[13] defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group." Further expanding that basic definition, Florida[14] defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Similarly, Kansas[15] defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group, and community."

Missouri and North Carolina, however, have adopted definitions of adaptive functioning or adaptive behavior that are strikingly different from the definitions found in the statutes of Washington, Arizona, Connecticut, Florida, and Kansas. Missouri's definition[16] of mental retardation specifies that there must be a showing of "continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work." North Carolina's statute[17] specifies that

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13 Connecticut (C.G.S.A. § 1-1g(b) (2001)).

14 Florida (West's F.S.A. § 921.137(1) (2001)).

15 Kansas (K.S.A. § 76-12b01(a) (1994)).

16 Missouri (§ 565.030.6 R.S.Mo. (2001)).

17 North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(b) (2001)).

"significant limitations in adaptive functioning" means "significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills." The remaining eleven states[18] have not set forth a definition of "adaptive functioning" or "adaptive behavior" in their statutes. Thus, an examination of these eighteen statutes clearly reveals that there is no consensus among these states with respect to how the "adaptive functioning" or "adaptive behavior" element should be understood and defined within a definition of mental retardation.

In his brief, Atkins explains that the third "essential" element in a definition of mental retardation would be that the mental retardation must manifest itself or become apparent during the "developmental period." (Brief for Pet. at 20-21) Sixteen of the eighteen states[19] do have a version of this element, but as with the first two elements, these states disagree about how this element

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18 Arkansas (Ark. Stat. Ann. § 5-4-618 (1993)); Colorado (C.R.S. § 16-9-401 (1993)); Georgia (O.C.G.A. § 17-7-131 (1988)); Indiana (IN ST 35-36-9-6 (1994)); Kentucky (KRS § 532.130 (1990)); Maryland (Md. Ann. Code art. 27, § 412 (1989)); Nebraska (R.R.S. Neb. § 28-105.01 (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1 (1991)); New York (NY CLS CPL § 400.27 (1995)); South Dakota (SDCL § 23A-27A-26.1 (2000)); Tennessee (Tenn. Code. Ann. § 39-13-203 (1990)).

19 As discussed above, the requirement that an individual's mental retardation manifest itself during the "developmental period" is absent from the definition of mental retardation set forth in the Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)) and New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)) statutes.

should be understood and defined. Ten of the states[20] require a showing that an individual's mental retardation manifested itself before that individual attained the age of eighteen to deem that individual mentally retarded. One state[21] specifies that an individual's mental retardation must become apparent during "the developmental period, but no later than age eighteen." Two states[22] specify that an individual's mental retardation must become apparent before he or she attains the age of twenty-two. Finally, three other states[23] require that an individual's mental retardation manifest itself or become apparent during the "development period," but unlike the thirteen states discussed above, these states neither define what is meant by the "developmental period" nor set forth any specific age by which an individual's mental retardation must become apparent. Thus, an examination of these statutes fails to reveal a consensus among these states with respect to how the "developmental period" element,

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20 Arizona (A.R.S. § 13-703.02(J)(2) (2001)); Connecticut (C.G.S.A. § 1-1g(b) (2001)); Florida (West's F.S.A. § 921.137(1) (2001)); Kansas (K.S.A. § 76-12b01(d) (1994)); Missouri (§ 565.030.6 R.S.Mo. (2001)); New York (NY CLS CPL § 400.27(12)(e) (1995)); North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(a) (2001)); South Dakota (SDCL § 23A-27A-26.1 (2000)); Tennessee (Tenn. Code. Ann. § 39-13-203(a)(3) (1990)); Washington (WA ST § 10.95.030(2)(e) (1993)).

21 Arkansas (Ark. Stat. Ann. § 5-4-618(a)(1)(A) (1993)).

22 Indiana (IN ST 35-36-9-2 (1994)); Maryland (Md. Ann. Code art. 27, § 412(f)(3) (1989)).

23 Colorado (C.R.S. § 16-9-401(2) (1993)); Georgia (O.C.G.A. § 17-7-131(a)(3) (1988)); Kentucky (KRS § 532.130(2) (1990)).

if included within a definition of mental retardation, should be understood and applied.

B. The Eighteen States Sharply Disagree About The Proper Burden Of Proof That An Individual Must Satisfy In Order To Establish That He Or She Is Mentally Retarded.

An analysis of the relevant statutes in each of these states also reveals that the states sharply disagree with respect to the proper burden of proof that an individual must satisfy before the individual can be deemed mentally retarded. Nine of the eighteen states[24] specify that an individual has the burden of proving mental retardation by a preponderance of the evidence. Four of the states[25] specify that an individual has the burden of proving his or her mental retardation by clear and convincing evidence, and one state[26] employs the beyond-a-reasonable-doubt-standard. In addition, North Carolina[27] mandates that an individual must establish his

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24 Arkansas (Ark. Stat. Ann. § 5-4-618(c) (1993)); Maryland (Md. Ann. Code art. 27, § 412(g)(1) (1989)); Missouri (§ 565.030.4(1) R.S.Mo. (2001)); Nebraska (R.R.S. Neb. § 28-105.01(5) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)); New York (NY CLS CPL § 400.27(12)(a) (1995)); South Dakota (SDCL § 23A-27A-26.3 (2000)); Tennessee (Tenn. Code. Ann. § 39-13-203(c) (1990)); Washington (WA ST § 10.95.030(2) (1993)).

25 Arizona (A.R.S. § 13-703.02(F) (2001)); Colorado (C.R.S. § 16-9-402(2) (1993)); Florida (West's F.S.A. § 921.137(4) (2001)); Indiana (IN ST 35-36-9-4(b) (1994)).

26 Georgia (O.C.G.A. § 17-7-131(c)(3) (1988)).

27 North Carolina (N.C.G.S.A. § 15A-2005(2)(c) (2001)).

or her mental retardation by clear and convincing evidence if he or she raises the issue at a pre-trial hearing about the issue before a trial court. The North Carolina statute[28] also provides, however, that, if the trial court determines that an individual is not mentally retarded, he or she may introduce evidence of mental retardation during the sentencing hearing, and in such a scenario, he or she must demonstrate mental retardation to the jury only by a preponderance of the evidence. Finally, the remaining three states[29] do not specify what burden of proof an individual must satisfy before he or she can be deemed mentally retarded. An examination of these eighteen statutes, therefore, fails to reveal a consensus among these states with respect to the proper burden of proof that an individual must satisfy before he or she can be deemed mentally retarded.

C. The Eighteen States Disagree About Whether The Trial Court Or The Jury Should Be Responsible For Determining If An Individual Is Mentally Retarded And About The Proper Time During A Criminal Proceeding For That Determination To Be Made.

A comparison of the statutes from these eighteen states illustrates that they differ significantly with respect to the issue of whether the trial court or the jury should be responsible for determining if an individual is mentally retarded and also with respect to the issue of

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28 North Carolina (N.C.G.S.A. § 15A-2005(2)(e) and (f) (2001)).

29 Connecticut (C.G.S.A. § 53a-46a (2001)); Kansas (K.S.A. § 21-4623 (1994)); Kentucky (KRS § 532.135 (1990)).

when, during the course of a criminal proceeding, such a decision should be made. Appendix of State Authorities, at 1a-7a.

More specifically, eight states[30] provide that the trial court may or must conduct a pre-trial hearing on the issue of the defendant's alleged mental retardation and determine whether the defendant is, in fact, mentally retarded. Three states[31] specify that the determination of whether the defendant is mentally retarded may or must be made during the trial phase of the proceedings by the trier of fact, and three other states[32] mandate that this determination be made by the trial court at a pre-sentencing hearing. In addition, four states[33] specify that this determination may or must be made by the trial court during the sentencing phase of the proceedings.

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30 Arizona (A.R.S. § 13-703.02(A), (F), and (G) (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618(d)(2) (1993)); Colorado (C.R.S. § 16-9-402(1) and (2) (1993)); Indiana (IN ST 35-36-9-5 (1994)); Kentucky (KRS § 532.135(1) and (2) (1990)); Missouri (§ 565.030.5 R.S.Mo. (2001)); North Carolina (N.C.G.S.A. § 15A-2005(c) and (e) (2001)); South Dakota (SDCL § 23A-27A-26.3 (2000)).

31 Georgia (O.C.G.A. § 17-7-131(c)(3) (1988)); Tennessee (Tenn. Code. Ann. § 39-13-203(c) and (e) (1990)); Washington (WA ST § 10.95.030(2) (1993)).

32 Kansas (K.S.A. § 21-4623(a) and (b) (1994)); Nebraska (R.R.S. Neb. § 28-105.01(5) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)).

33 Arkansas (Ark. Stat. Ann. § 5-4-618(d)(2) (1993)); Connecticut (C.G.S.A. § 53a-46a(h)(2) (2001)); Maryland (Md. Ann. Code art. 27, § 412 (1989)); North Carolina (N.C.G.S.A. § 15A-2005(c) (2001)).

The remaining two states,[34] Florida and New York, specify that the determination of whether the defendant is mentally retarded should be made by the trial court after the jury issues an advisory sentence to the trial court, but in the case of New York, the trial court must conduct a hearing on the mental retardation issue before the sentencing phase but can issue its ruling only after the jury submits its advisory sentencing recommendation. An examination of these statutes establishes that there is no consensus among these states with respect to the issue of whether the trial court or the jury should determine if an individual is mentally retarded and with respect to when, during the course of a criminal proceeding, such a decision should be made.

D. The Eighteen States Disagree About Whether All Or Only Certain Mentally Retarded Individuals Should Be Protected By These Statutes.

A careful examination of the relevant statutes in each of these eighteen states further reveals that the states sharply disagree with one another on the subject of whether the statutes should be applied prospectively or retroactively or, in other words, whether the statutes should be applied to individuals convicted before the effective date of these statutes. Nine states[35] expressly

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34 Florida (West's F.S.A. § 921.137(4) (2001)); New York (NY CLS CPL § 400.27(12)(a) and (c) (1995)).

35 Arizona (A.R.S. § 13-703.02(I) (2001)); Florida (West's F.S.A. § 921.137(8) (2001)); Indiana (IN ST 35-36-9-6 (1994)); Kansas (K.S.A. § 21-4631(c) (1994)); Kentucky (KRS § 532.140(3) (1990)); Maryland (Md. Ann. Code art. 27, § 412 (1989)); Missouri (§ 565.030.7 R.S.Mo. (2001)); New York (NY CLS CPL § 400.27 (1995)); Tennessee (Tenn. Code.

specify that their statutes are to be applied prospectively only. Given Arkansas case law, it is probable that the statute prohibiting the execution of the mentally retarded in Arkansas also would be interpreted to apply prospectively.[36] Two other states[37] specify that an individual who was convicted before the effective date of the statute prohibiting or restricting the execution of the mentally retarded has a certain amount of time to file a

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Ann. § 39-13-203 (1990)) (*See Van Tran v. State*, 2001 WL 1538508, at *5-8 (Tenn. Dec. 4, 2001)) (held that the statute prohibiting the execution of the mentally retarded does not apply retroactively to individuals sentenced to death before the effective date of the statute).

[36] Arkansas (Ark. Stat. Ann. § 5-4-618 (1993)). Although the Arkansas Supreme Court has not expressly resolved this issue, the general rule in Arkansas is that "all legislation is presumed to apply prospectively unless the legislature expressly declares, or necessarily implies by the language used, an intent to give a statute retroactive effect." *City of Cave Springs v. City of Rogers*, 37 S.W.3d 607 (Ark. 2001). Because the Arkansas statute is silent on this particular issue, it is likely that the courts in Arkansas would determine that this general rule applies and would, therefore, presume that the legislature intended for this statute to apply prospectively only.

37 Nebraska (R.R.S. Neb. § 28-105.01(4) (1998)) ("Within one hundred twenty days after July 15, 1998, a convicted person sentenced to the penalty of death prior to July 15, 1998, may bring a verified motion...requesting a ruling that the penalty of death be precluded...and that the sentence be vacated."); North Carolina (N.C.G.S.A. § 15A-2006(2) (2001)) ("A motion seeking appropriate relief from a death sentence on the ground that the defendant is mentally retarded, shall be filed: (a) On or before January 31, 2002, if the defendant's conviction and sentence of death were entered prior to October 1, 2001.")

motion requesting a ruling that the penalty of death be precluded because he or she is mentally retarded. In other words, the statutes in Nebraska and North Carolina are retroactive only for a certain limited amount of time, and once that period of time expires, the application of these statutes will become prospective.

One state,[38] however, expressly requires that its statute be applied retroactively. More specifically, Georgia courts have determined that Georgia's statute prohibiting the execution of the mentally retarded must be applied retroactively to individuals convicted before the effective date of the statute. *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989). Finally, the statutes in the five remaining states[39] are completely silent on the issue of whether they should be applied prospectively or retroactively. An examination of these eighteen statutes, therefore, demonstrates that there is no consensus among these states with respect to the issue of whether these statutes must be applied prospectively or retroactively.

Moreover, the fact that nine or ten states require that their statutes be applied prospectively only is instructive because it reveals that these states have not, in fact, prohibited the execution of all mentally retarded individuals. Instead, these states have only prohibited the execution of those mentally retarded capital murderers who are convicted and receive a death sentence

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38 Georgia (O.C.G.A. § 17-7-131 (1988)).

39 Colorado (C.R.S. § 16-9-402 (1993)); Connecticut (C.G.S.A. § 53a-46a (2001)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1 (1991)); South Dakota (SDCL § 23A-27A-26.1 (2000)); Washington (WA ST § 10.95.030 (1993)).

after the effective date of the state statute addressing the execution of the mentally retarded. In addition, it should be noted that one state, New York, has even included an exception to its general rule prohibiting the execution of the mentally retarded. In its statute, New York provides that "[i]n the event that...the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside...upon the ground that the defendant is mentally retarded." NY CLS CPL § 400.27(12)(d) (1995). An analysis of these eighteen statutes, therefore, establishes that there is not even a consensus among these states with respect to the issue of whether the ban on the execution of the mentally retarded should apply to all or only certain mentally retarded capital murderers.

E. Conclusion.

As in *Penry*, the question presented here is "whether the Eighth Amendment *categorically prohibits* [Atkins]'s execution [assuming that] he is mentally retarded." *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989) (emphasis added). Moreover, consistent with its previous evaluation of the issue, in order to resolve the question favorably to Atkins, this Court must find the existence of "an emerging national consensus" against the execution of the mentally retarded. *Id.* at 334-35. Plainly, there is no "emerging national consensus" favoring categorical prohibition of the execution of the mentally retarded. A "categorical prohibition" would be one without exceptions, conditions, or qualifications. *See* Webster's New International Dictionary Unabridged (3rd ed. 1993) (defining categoric as "[a]bsolute, unqualified"). *See also Stanford v. Kentucky*, 492 U.S. 361, 375-76 (1989) (plurality opinion) (stating the "[t]he application of [an individualized

sentencing] system to [17 and 18 year olds] can be declared constitutionally inadequate only if there is a consensus, not that 17 or 18 is the age which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which *no one* can reasonably be held fully responsible"). Atkins's reliance on the eighteen statutes discussed above to support his contention of an "emerging national consensus" fails. As conclusively demonstrated, each of the statutes contains various exceptions, qualifications, and conditions, which differ from state to state. The statutes do not, therefore, support the conclusion that the Eighth Amendment categorically prohibits execution of the mentally retarded.

II. SOCIETY'S EVOLVING STANDARDS OF DECENCY, EVIDENT THROUGH THE LEGISLATIVE ENACTMENTS OF THE STATES, DO NOT WARRANT GRANTING THE RELIEF REQUESTED BY ATKINS.

In the previous section of this brief, *amici* set forth the legislative enactments that have been passed in those states that have specific statutes dealing with mental retardation and the imposition of the death penalty. In addition to these statutes, the Court should be cognizant of those states, such as Alabama, that address this issue through the use of *Penry*-compliant sentencing schemes.[40]

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[40] For example, in Alabama, a capital defendant may assert the issue of mental retardation through the "mental disease or defect" defense, ALA. CODE § 13A-3-1, through two statutory mitigating circumstances, ALA. CODE §§ 13A-5-51(2) and (6), and by presenting it as a non-statutory mitigating circumstance. ALA. CODE § 13A-5-52.

An examination of these legislative enactments is the only proper way for this Court to determine the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). As the Court noted in *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion), public opinion polls and the views of interest groups do not determine these cases, but rather, "[a] revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition on all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *See also Harmelin v. Michigan*, 501 U.S. 957, 988 (1990) (plurality opinion) ("The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.").

Historical events demonstrate that this Court is not in the best position to take the pulse of American society, absent legislative evidence. For example, in *Furman v. Georgia*, 408 U.S. 238 (1972), this Court struck down the death penalty despite the fact that forty-one states, the District of Columbia, and other federal jurisdictions had legislation authorizing capital punishment. *Id.* at 341 (Marshall, J. concurring). Four years later, this Court admitted that it erroneously determined the level of evolution reached by society, noting "it is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction." *Gregg*, 428 U.S. 153, 179 (1976).

Courts in Massachusetts and California learned the importance of looking at legislation to determine society's standards of decency, as well. Less than nine months after the California Supreme Court struck down capital punishment "in the light of contemporary standards," in

People v. Anderson, 493 P.2d 880, 887 (Cal. 1972), voters in California went to the polls and amended their state constitution to explicitly allow for capital punishment. *Constitution of California of 1879*, Art. 1, § 27 (Added Nov. 7, 1972). Likewise, when the Supreme Judicial Court of Massachusetts struck down capital punishment based on "contemporary standards," in *District Attorney for the Suffolk District v. Watson*, 411 N.E.2d 1274 (Mass. 1980), society rejected the court's interpretation of its will by amending the constitution to allow for capital punishment. MASS. GEN. LAWS CONST., Pt. 1, Art. 26 (Amended 1982).

Thus, whereas Atkins's brief devotes no portion of his argument to discussing the actual statutes that have been passed, this Court should not concern itself with any considerations other than what the current legislation indicates about society's standards of decency. To act without considering current legislation nationwide, including the vastly different approaches, procedures, and definitions employed by each state, would be to decide this issue in a manner that does not come close to representing contemporary standards.

Perhaps Atkins avoids discussing the details of each of the statutes addressing capital punishment and mental retardation because there is simply no national consensus as to what mental retardation is or at what point it negates a capital murderer's responsibility. Each state that currently authorizes capital punishment takes active steps to ensure that the issue of mental retardation is addressed. Despite this fact, not every state agrees with what mental retardation is or when it should operate to negate a capital murderer's responsibility or culpability. Nebraska and New Mexico, for example, do so by allowing a finding of mental retardation even where

the condition does not manifest itself during the defendant's developmental period. Kansas's mental retardation statute, like Alabama's statutory mitigation approach to this issue, requires the defendant to demonstrate that his or her mental retardation "substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." K.S.A. § 76-12b01(d); § 21-4623(e).

As noted above, six states require an intelligence quotient of seventy (70) or below to establish significantly subaverage intellectual functioning. Two states have set forth an intelligence quotient of sixty-five (65) or below to meet this element of mental retardation. Five states do not set forth any definition of this element. Additional states set forth rebuttable presumptions based on whether an individual's intelligence quotient is seventy (70) or below.

The states also disagree on what constitutes a deficit in adaptive functioning. As shown above, eight states require a showing of "significant" or "substantial" deficits or limitations in adaptive functioning, but the other ten require only a showing of "deficits" or "limitations." In states, such as Alabama, that use a statutory mitigation approach, the requirement is to show either that the defendant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" or that the offense was committed while the defendant was under the influence of

"extreme mental or emotional distress." ALA. CODE §§ 13A-5-51(2) and (6).[41]

The survey of current legislation, above, sets forth many additional differences in the various statutes of the states that have specifically dealt with capital punishment and mental retardation. This is in addition to the differences among those states that have elected to adopt only *Penry*-compliant mitigation schemes. These differences, however, are important because they make one issue especially clear: although the nation, as a whole, is examining (or re-examining) the issue of capital punishment and mental retardation, there is simply no national consensus that warrants either the adoption of one uniform standard or an Eighth Amendment pronouncement by this Court.

Each state is addressing this issue in the manner dictated by its residents. The legislators of each state are normally never more than two years away from their previous or next elections. It is this frequent electoral interaction between society and its elected legislative bodies that makes the current legislation so important in this analysis. Further, the Court can see from the scope of the various legislation that has been enacted that society is expressing its standards of decency through the legislative process.

This fact, however, does not justify a finding that this Court must, today, hold that there is a set definition of mental retardation that must be imposed on all states that utilize capital punishment. Instead, this fact should

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[41] This is in addition to the ability of a defendant to introduce any evidence "that the defendant offers as a basis for life imprisonment without parole instead of death." ALA. CODE §§ 13A-5-52.

be viewed by the Court as an indication that each state continues to work toward improving its criminal justice system while addressing any concerns of contemporary values.

In *Johnson v. Louisiana*, 406 U.S. 356 (1972), this Court approved Louisiana's use of a majority vote requirement for criminal jury verdicts, as opposed to a requirement of unanimity.[42] In reaching this decision, this Court paid great deference to the Louisiana Legislature despite the fact that most states required unanimous verdicts. *Id.* at 365. In his concurring opinion, Justice Powell made the following particularly relevant observation:

> While the Civil War Amendments altered substantially the balance of federalism, it strains credulity to believe that they were intended to deprive the States of all freedom to experiment with variations in jury trial procedure. In an age in which empirical study is increasingly relied upon as a foundation for decision making, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal

[42] Although *Johnson* did not involve capital punishment, it did involve an offense punishable at hard labor.

> justice system. The same diversity of local legislative responsiveness which marked the development of economic and social reforms in this country, if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining--fairly and more expeditiously--the guilt or innocence of the accused.

(footnote omitted) Justice Powell's remarks were based, in part, on Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As Justice Brandeis noted in that case, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* (Brandeis, J., dissenting).

Today, each state is conducting its own experiment involving the mental retardation issue, so it is simply premature to conclude that there is a national uniform standard setting forth a definition of mental retardation and under what circumstances that condition would excuse a convicted capital murderer from execution. Even Atkins notes in his brief that many of these statutes have been enacted in the past several years, meaning that any attempt to fashion a national standard from such legislation would require adopting, in some instances, laws and procedures that are unproved. (Brief for Pet. at 38-39)

For this reason, this Court should reject Atkins's argument and allow each state—those with specific statutes addressing mental retardation in the context of

capital punishment as well as those states that have opted for *Penry* compliant schemes—to continue to respond to its residents' concerns through legislation. All states that authorize capital punishment have statutes or rules that address whether a mentally retarded individual should be executed. All states should, therefore, be allowed to continue exploring the issue of when mental retardation should be a factor negating a capital defendant's actual responsibility and culpability as opposed to when it is, as it is in Atkins's case, merely an attempt to avoid execution. Thus, the Court should decline to set a uniform national standard or to grant Atkins the relief requested.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

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APPENDIX OF STATE AUTHORITIES

Arizona

"If the state files a notice of intent to seek the death penalty, the court shall appoint a prescreening psychological expert in order to determine [t]he defendant's intelligence quotient [and the] expert shall submit a written report of the intelligence quotient determination to the court within ten days of the testing..."

"No less than thirty days after the...reports are submitted to the court and before trial, the trial court shall hold a hearing to determine if the defendant has mental retardation."

"If the trial court finds that the defendant has mental retardation, the trial court shall dismiss the intent to seek the death penalty, shall not impose a sentence of death on the defendant..." (A.R.S. § 13-703.02(A), (F), and (G) (2001)).

Arkansas

"Prior to trial, the court shall determine if the defendant is mentally retarded. If the court determines that the defendant is not mentally retarded, the defendant may raise the question of mental retardation to the jury for determination *de novo* during the sentencing phase of the trial." (Ark. Stat. Ann. § 5-4-618(d)(2) (1993)).

Colorado

"Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant. Such motion shall be filed at least ninety days prior to trial."

"The court shall hold a hearing upon any motion filed pursuant to subsection (1) of this section and shall make a determination regarding such motion no later than ten days prior to trial." (C.R.S. § 16-9-402(1) and (2) (1993)).

Connecticut

"The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by special verdict...that at the time of the offense...the defendant was a person with mental retardation as defined in section 1-1(g)." (C.G.S.A. § 53a-46a(h)(2) (2001)).

Florida

"After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts...who shall evaluate the defendant and report their findings to the court...At the final sentencing hearing, the court shall consider the findings of the court-appointed experts...If the court finds...that the defendant has mental retardation, the court may not order a sentence of death..." (West's F.S.A. § 921.137(4) (2001)).

Georgia

"The defendant may be found 'guilty but mentally retarded' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such a finding, it shall so specify in its verdict." (O.C.G.A. § 17-7-131(c)(3) (1988)).

Indiana

"Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is a mentally retarded individual based on the evidence set forth at the hearing..." (IN ST 35-36-9-5 (1994)).

Kansas

"If...the county or district attorney has filed a notice of intent to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death and the defendant is convicted of the crime of capital murder, the defendant's counsel...may request a determination by the court of whether the defendant is mentally retarded..."

"At the hearing, the court shall determine whether the defendant is mentally retarded." (K.S.A. § 21-4623(a) and (b) (1994)).

Kentucky

"At least thirty (30) days before trial, the defendant shall file a motion with the trial court wherein the defendant may allege that he is a seriously mentally retarded defendant and present evidence with regard thereto. The Commonwealth may offer evidence in rebuttal."

"At least ten (10) days before the beginning of the trial, the court shall determine whether or not the defendant is a seriously mentally retarded defendant..." (KRS § 532.135(1) and (2) (1990)).

Maryland

Richardson v. State, 598 A.2d 1, 3-4 (Md. App. 1990) (held that the issue of mental retardation is properly determined by the trier of fact at the sentencing stage of the proceedings, not pre-trial or pre-sentencing).

Missouri

"Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact [as a mitigating circumstance,] as provided in subsection(4)." (§ 565.030.5 R.S.Mo. (2001)).

Nebraska

"For any convicted person who may be sentenced to the penalty of death on or after July 15, 1998, the court shall hold a hearing prior to any sentencing hearing...If the court finds...that the defendant is a person with mental retardation, the death penalty shall not be imposed. A ruling by the court that the evidence...does not preclude the death penalty...shall not restrict the defendant's opportunity to...argue that such evidence should be given mitigating significance." (R.R.S. Neb. § 28-105.01(5) (1998)).

New Mexico

"Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding...If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment." (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)).

New York

"Upon the conviction of a defendant for the offense of murder in the first degree..., the court shall...promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded...The court shall defer

rendering any finding pursuant to this subdivision as to whether the defendant is mentally retarded until a sentence is imposed pursuant to this section."

"In the event the defendant is sentenced...to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment..." (NY CLS CPL § 400.27(12)(a) and (c) (1995)).

North Carolina

"[T]he court may order a pretrial hearing to determine if the defendant is mentally retarded...If the court determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the State may not seek the death penalty..."

"If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded...This special issue shall be considered and answered by the jury prior to the consideration of the aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment." (N.C.G.S.A. § 15A-2005(c) and (e) (2001)).

South Dakota

"Not later than ninety days prior to the commencement of trial, the defendant may... apply for an order directing

that a mental retardation hearing be conducted prior to trial. If...the court finds reasonable cause to believe the defendant was mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant was mentally retarded. If the court finds after the hearing that the defendant was not mentally retarded at the time...of the offense, the court shall, prior to commencement of trial, enter an order so stating...If the court finds after the hearing that the defendant established mental retardation by a preponderance of the evidence, the court shall prior to the commencement of trial, enter an order so stating." (SDCL § 23A-27A-26.3 (2000)).

Tennessee

"The determination of whether the defendant was mentally retarded...shall be made by the court."

"If the issue...is raised at trial and the court determines that the defendant is not a person with mental retardation, the defendant shall be entitled to offer evidence...of diminished intellectual capacity as a mitigating circumstance..." (Tenn. Code. Ann. § 39-13-203(c) and (e) (1990)).

Washington

"In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed... A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation." (WA ST § 10.95.030(2) (1993)).